Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:HAR:TL-N-5844-00
MIRoot

date: November 20, 2000

to: Territory Manager (LM:FSH)
Santino F. Bonanni

from: Associate Area Counsel (CC:LM:FSH:HAR)

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subject: [redacted]

DISCLOSURE STATEMENT

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DISCUSSION

This is in response to your request dated October 11, 2000 and received by the Buffalo, New York office October 16, 2000 concerning the captioned taxpayer. Generally, the issues involved concern the proper person(s) on behalf of the taxpayer, a dissolved corporation, to execute a consent to extend the period in which to assess a tax and to appoint a representative of the taxpayer.

Facts

[redacted] (the "taxpayer") was incorporated in New York State. In [redacted] it sold its assets to another corporation. In [redacted], after the sale of its assets, the taxpayer was liquidated.

The taxpayer filed its returns on a fiscal year (ending October 31) basis. It filed returns for its years ending October 31, [redacted], [redacted] and a final return for the period ending [redacted].

The Internal Revenue Service agent discovered the taxpayer's sale of its assets and its subsequent liquidation and dissolution during an audit of the purchasing corporation. The agent sent an audit letter to the taxpayer for its taxable years ending October 31, [redacted] and [redacted] and its short year ([redacted] - [redacted]). The agent received a power of attorney (Form 2848), for all of years scheduled for audit, appointing as the taxpayer's representative, the corporate president. The Form 2848 was executed by the president. However, this individual was not designated as the taxpayer's president on the Form 2848.

These facts give rise to the following issues.

Issues

1. Whether a person can execute an extension of time for assessment for a liquidated corporation, and if so, who would be the proper party to do so?

2. Whether the taxpayer's current Form 2848, appointing its former president as its power of attorney, but not designating him as such, is valid?

3. Whether the taxpayer, now liquidated, can appoint a power of attorney (assuming the current power of attorney is not valid)?

Analysis

Issue 1

Generally, a tax must be assessed within three (3) years after the return was filed. I.R.C. § 6501. However, at any time prior to the expiration of the prescribed time, the Secretary and the taxpayer may consent in writing that the tax may assessed after the expiration of the three (3) year period. I.R.C. §

6501(c)(4).

Any return, statement or document made under any internal revenue law must be signed in accordance with applicable forms or regulations. I.R.C. § 6061. However, the regulations under section 6501(c)(4) do not specify who may sign consents executed under that section. As such, the Internal Revenue Service applies the rules applicable to execution of original tax returns to consents to the extension of time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 349.

A corporation's income tax return must be signed by its president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. I.R.C. § 6062. These same parties are the appropriate persons to sign, pursuant to section 6501, an agreement for an extension of time to assess a tax liability. Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified Rev. Rul. 84-165, 1984-2 C.B. 305.

In New York, a corporation after its dissolution may carry on no activities except for the purpose of winding up its affairs. N. Y. Bus. Corp. Law, §§ 1005(a)(1), 1117(a). In the process of winding up its affairs, the corporation is vested with the power to fulfill or discharge contracts, collect and sell its assets, discharge or pay its liabilities and do all other acts appropriate to liquidate its business. N.Y. Bus. Corp. Law, § 1005(a)(2). This includes the power to sue or be sued in all courts and to participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and also to be served with process. N.Y. Bus. Corp. Law, §§ 1006(a)(4). Thus, a dissolved corporation may sue, or be sued, in the process of, or as part of, the winding up of its affairs. Iqbara Realty Company v. New York Property Ins., 94 A.D. 2d 79, 463 N.Y.S. 2d 211 (1st Dept. 1983); Briere v. Baberea 163 A.D. 2d 659, 558 N.Y.S. 2d 278 (3rd Dept., 1990).

In short, a dissolved corporation (and its officers, directors, and shareholders) may continue to function for the purpose of winding up its affairs in the same manner as if dissolution had not taken place. N.Y. Bus. Corp. Law, § 1006(a). The dissolution of a New York corporation does not affect any remedy available against the corporation, its directors, officers, shareholders for any liability incurred before such dissolution. N.Y. Bus. Corp. Law, § 1006(b).

In states in which a dissolved corporation continues in existence for the purpose of winding up its affairs, any authorized officer may sign a consent (to extend the time to assess tax) during that period. Rev. Rul. 83-41, 1983-1 C.B.

349. Also, in states where directors are authorized to act for a dissolved corporation, any one of the directors may sign the consent for the corporation. Rev. Rul. 84-165, 1984-2 C.B. 305.

Accordingly, in New York, any authorized officer (see I.R.C. § 6062) may sign a consent during the period the corporation continues in existence under New York State law. Obviously, this would include the president (and any other officer)of the taxpayer in this case. A director of the taxpayer also has the authority to execute such a consent.

Since the taxpayer's officers, directors (and others specified in section 6062) have the authority to execute a consent they need not be appointed, by means of a Form 2848, power of attorney in order to do so.

Issues 2 & 3

The Secretary of the Treasury is authorized to prescribe rules and regulations governing the recognition of persons representing cliamants before his department. 31 U.S.C. § 330. The Treasury Department has adopted such rules governing the recognition and conduct of persons representing taxpayers before the Internal Revenue Service which have been promulgeted in what is commonly referred to as Treasury Department 230 and codified at 31 C.F.R. part 10. 26 C.F.R. § 601.501(b)(3). Additionally, conference and practice requirements applying to all offices of the Internal Revenue Service have been promulgated as Title 26, Part 601 of the Code of Federal Regulations.

Generally, these rules detail the means by which a recognized representative is authorized to act on behalf of a taxpayer. 26 C.F.R. § 601.501(a). Generally, this authority must be evidenced by a power of attorney and declaration of representative filed with the appropriate office of the Internal Revenue Service. Id.

A recognized representative (of a taxpayer) is an individual who is: (a) appointed as an attorney-in-fact under a power of attorney; and (b) a member of one of the following categories (who has filed a declaration of representative) - (i) attorney, (ii) certified public accountant, (iii) enrolled agent, (iv) enrolled actuary, (v) person holding a special relationship or status with the taxpayer, such as a bona fide officer or regular full time employee of a corporation. 26 C.F.R. § 601.502(a).

A power of attorney (e.g. Form 2848) must, among other things, contain the name and mailing address of the recognized representative. 26 C.F.R. § 601.503(a). There is no requirement

that when the representative's authorization is based upon a "relationship or special status with the taxpayer" under 26 C.F.R. § 601.502(b)(5)(ii), that the "relationship or special status" be specified in the power of attorney. 26 C.F.R. § 601.503(a).

Thus, the fact that the Form 2848 at issue does not indicate that the representative is or was the taxpayer's corporate president does not, in and of itself, invalidate the power of attorney. Nevertheless, the Internal Revenue Service "may" require the taxpayer (or individual required or authorized to sign on behalf of a taxpayer) to submit "appropriate identification or evidence of authority." 26 C.F.R. § 601.503(c). While this provision does not appear to invalidate the power of attorney at issue, it does authorize the Service to request verification of the authority of the taxpayer and/or its representative.

The individual who must execute the power of attorney on behalf of the taxpayer depends on the type of taxpayer involved. 26 C.F.R. § 601.503(c). In the case of a corporation, a power of attorney must be executed by an officer of the corporation having authority to legally bind the corporation. 26 C.F.R. § 601.503(c)(3). Such officer must certify that he/she has such authority. Id.

Generally, when a fiduciary is involved in a tax matter a power of attorney is not required. 26 C.F.R. § 601.503(d). Instead, Internal Revenue Service Form 56 - Notice Concerning Fiduciary Relationship, should be filed. Id. Thus, in the case of a dissolved corporation, Form 56 - Notice Concerning Fiduciary relationship should be filed by the liquidating trustee, if one has been appointed, or by the trustee deriving authority under the law of the jurisdiction in which the corporation was organized. 26 C.F.R. § 601.503(d)(1)(i). If the authority of the trustee is derived under the law of a jurisdiction, the Internal Revenue Service may require a statement (signed under penalty of perjury) setting forth the facts required by law as a condition precedent to the vesting of authority in the trustee and also stating the authority has not terminated. Id.

If there is no appointed trustee for a dissolved corporation, the Form 56 should be filed by the stockholder(s) holding a majority of the voting stock of the corporation as of the date of the dissolution. 26 C.F.R. § 601.503(d)(1)(ii). The Internal Revenue Service may require a statement showing the total number of outstanding shares of voting stock as of the date of dissolution, the number of shares held by each signatory, the date of dissolution, and a representation that no trustee has

been appointed. Id.

In this case, since no Form 56 - Notice Concerning Fiduciary Relationship has been filed by the stockholder(s) holding a majority of the voting stock of the corporate taxpayer as of the date of the dissolution, the taxpayer has not properly authorized a representative to act on its behalf.

CONCLUSION

Any officer or director of the taxpayer, including its president has the authority to execute a consent to extend the period to assess. Since the taxpayer's officers, directors (and others specified in section 6062) have the authority to execute a consent they do not need to be appointed as a fiduciary by means of Form 56 (or as power of attorney by means of a Form 2848), in order to do so.

If the taxpayer is going to represented by a fiduciary and a liquidating trustee has been appointed, or derives authority under New York law, such trustee is the proper party to appoint such fiduciary (by means of Form 56). If there is no trustee, the Form 56 should be filed by the stockholder(s) holding a majority of the voting stock of the corporation as of the date of the dissolution.

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